IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
CIRCUIT COURT

Daniel D. Hall, Circuit Court Judge

Case No. 2017-CP-46-01964
Appellant Case No. 2020-000027

Winston Shell.....Respondent,

vs.

Nathaniel Shell.....Appellant.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Pursuant to Rule 242, SCACR, Petitioner, Nathaniel Shell, Appellant, v. Winston Shell, Respondent, Unpublished Opinion No. 2021-UP-436, 2020-000027 (S.C. Ct. App. filed December 8, 2021).

CERTIFICATE OF COUNSEL

Counsel certifies that the petition for rehearing was made on February 6, 2022 and denied by the Court of Appeals on March 24, 2022.

QUESTIONS PRESENTED FOR REVIEW

I. **Did the Court of Appeals err by finding that the lower court did not abuse its discretion in hearing this trial the Tuesday of the trial week with Appellant not having a single witness available to present its case when the court was aware that Appellant was present and ready the Monday of the trial term, was told the judge assigned to the case was not available Tuesday because of a jury trial and a personal conflict, and when Appellant's attorney did not receive notice the trial was beginning on Tuesday until that same morning.**

STATEMENT OF THE CASE

Winston Shell, Respondent, commenced this action with the filing of a Summons and Complaint on July 7, 2017, alleging a single cause of action for breach of contract to collect money claimed to be owed to him by his brother, Nathaniel Shell. Nathaniel Shell, Appellant, timely filed an Answer and Counterclaim on December 18, 2017 denying Respondent's allegations and filed an Amended Answer removing the Counterclaim on January 4, 2018. The Circuit Court denied Respondent's Motion for Summary Judgment in an order dated July 11, 2019. Thereafter, a bench trial was scheduled in the case for the trial week beginning Monday, December 9, 2019. The case was called Tuesday, December 10, 2019 and was completed that same day. The Court issued a Form 4 Order December 10, 2019 at 3:09 p.m. ruling in Respondent's favor in the amount of "$211,2887.12". The Court issued an order correcting this typographical error on December 10,

2020 at 3:29 p.m. with the only difference being the amount of the judgment being changed to read "$211,287.12".

Subsequent to service of this Order, Appellant served and filed his Motion for a New Trial pursuant to Rule 59, SCRCP on January 3, 2020. Appellant also filed a Notice of Appeal from the December 10, 2019 trial order on January 8, 2020. A hearing on Appellant's Motion for New Trial was scheduled and held before the Honorable Daniel D. Hall on February 3, 2019. Following this hearing, the Court entered a Form 4 Order denying Appellant's Motion for New Trial on February 6, 2020. Appellant filed a Notice of Appeal of the denial of his Motion for New Trial February 6, 2020. Seeing that two appeals had been filed on the same case, the Court of Appeals consolidated these appeals into one appeal with the above caption in its letter to the parties dated February 10, 2020. The Court of Appeals affirmed the trial court's decision December 8, 2021 and Appellant's Petition for Rehearing was March 24, 2022.

STATEMENT OF FACTS

This case involves an action by Respondent to collect money he claimed to have loaned Appellant, his brother, over the years. The case hinged on the disputed characterization of money that Respondent had given Appellant over the years and the true nature of a purported mortgage Respondent had on a property owned by Appellant. Appellant had also raised disputes relating to how much money had Appellant repaid Respondent over the years.

Appellant was represented by Neil T. Phillips, Esquire for the trial and the case was set on the trial roster of the week beginning Monday, December 9, 2019 in York County. Judges William A. McKinnon and Daniel D. Hall were the two trial judges for this trial term in York County.

Both Counsel for Appellant and Respondent received an email from the Lynn Straight at the York County Clerk of Court's office on December 4, 2019 indicating that Judge McKinnon

had a date certain jury trial beginning Monday, December 9, 2019, would have to stop Tuesday at 2:00 so Judge McKinnon could attend to a prior commitment, and then continue Wednesday morning. (email dated December 4, 2019; R. p.184). The email also indicated that Mr. Phillips had a jury trial before judge Hall set to begin the Wednesday of this trial week, December 11, 2019. *Id.* The email from Ms. Straight specifically asked Beverly Carroll and Neil Phillips to attend the roster meeting to discuss the issues surrounding the Wednesday jury trial and the "Shell v. Shell non-trial [sic] scheduled before Judge McKinnon." *Id.*

Appellant and his witness, Willie Shell, who lived in Pennsylvania, appeared at Mr. Phillips' office the Monday morning of the trial week for the trial. (12/9/19 email, R. p. 187; affidavit of N. Shell, R. pp. 176-177). Mr. Phillips appeared at the roster meeting on December 9, 2019 at 9:30 a.m. before Judge Hall and was told that this case would be subject to being called in front of Judge McKinnon. (Trial Tr. p. 5, ll. 17-20; R. p. 82). Mr. Phillips was also told by Judge Hall that Judge Hall himself had a jury trial set to be trial Monday. (Trial Tr. p. 5, ll. 17-20; R. p. 82). The court obtained the parties' attorney's cell phone numbers to let them know about any changes (Trial Tr. p. 5, l. 24 – p. 6, l. 3; R. pp. 82-83).

Mr. Phillips sent the clerk, Lynn Straight, copying Beverly Carroll, an email at 2:10 p.m. Monday, December 9, 2019 letting her know that he had out of state witnesses that needed to return home and asking if there was any chance at the case would be heard on Tuesday by Judge McKinnon. (12/9/19 email; R. p. 60). Ms. Carroll replied to the email at 2:14 p.m. reminding Mr. Phillips that the court had informed them that Judge McKinnon was in a trial and also had a personal commitment Tuesday afternoon. (12/9/19 email; R. p. 59). Mr. Phillips responded at 2:20 p.m. indicating that he had forgotten about the conflict Judge McKinnon had and would have to regroup with his client. (12/9/19 email; R. p. 58). Knowing that the assigned judge, Judge

McKinnon, was in a jury trial and had a personal conflict through at least Tuesday and that Mr. Phillips himself was scheduled to start a jury trial before Judge Hall on Wednesday that would take precedence over this bench trial, Mr. Phillips told his client and the witness who travelled from Pennsylvania that the case would not be called this trial week. (Trial Tr. p. 6, ll. 18-21, R. p. 83; Affidavit of N. Shell; R. p. 176-177). Based on this information, Appellant then made alternate plans for Tuesday and the rest of the week, and his out of state witness returned home Monday evening. (Affidavit of N. Shell; R. p. 176-177).

After telling his client and his out of state witness that the trial would not be called this trial week, Mr. Phillips began preparing for the jury trial he had scheduled before Judge Hall that Wednesday. (Trial Tr. p. 6, l. 22 – p. 7, l. 3; R. pp. 83-84). At 2:30 p.m. on Monday, December 9, 2019, Lynn Straight sent Mr. Phillips and Ms. Carroll an email that Judge Hall was calling this case for trial before himself for Tuesday Morning. (12/9/19 2:30 p.m. email; R. p. 58). Judge Hall's jury trial set for Monday ended up resolving and he was now available to hear this case and was willing to hear it despite the parties being told that Judge McKinnon was assigned the case. (Trial Tr., p. 5, ll. 20-23; R. p. 82). This email from Ms. Straight was the only communication Ms. Straight made to Mr. Phillips informing him the case was being called for trial Tuesday morning. There is no evidence that Ms. Straight called Mr. Phillips on the cell phone number the court had received from him at the roster meeting for this purpose.

Because he was dedicating all of his attention to preparing for Wednesday's jury trial, Mr. Phillips did not receive the email from Lynn Straight on Monday afternoon informing him that Judge Hall wanted to hear this case on Tuesday morning until early Tuesday morning. (Trial Tr. p. 6, ll. 4-6; R. p. 83). Mr. Phillips was not able to get in touch with Appellant to inform him of the last-minute schedule change on Tuesday morning when he received Ms. Straight's email.

(Trial Tr. p. 5, ll. 9-12; R. p. 82). Despite Appellant's counsel's complaints about needing additional time to contact his client and not being able to present his case without him, the court proceeded with the trial without the presence and testimony of Appellant and his out of state witness. (Trial Tr. p. 5, l. 9 – p. 7, l. 14; R. p. 82).

ARGUMENT

The Court of Appeals erred by failing to find that the lower court did not abuse its discretion in hearing this trial the Tuesday of the trial week with Appellant not having a single witness available to present its case when the court was aware that Appellant was present and ready the Monday of the trial term, was told the judge assigned to the case was not available Tuesday because of a jury trial and a personal conflict, and when Appellant's attorney did not receive notice the trial was beginning on Tuesday until that same morning.

The Court of Appeals erred by failing to find that the trial judge abused his discretion in deciding to move forward with the trial without the presence of a key witness and a party in the case leaving Appellant without any witnesses to present its side of the case. SCRCP Rule 40(i)(2), states in relevant part, "No motion for continuance shall be granted on account of the absence of a witness without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action or defense of the party moving; that the motion is not intended for delay; but is made solely because the party cannot go safely to trial without such testimony; that there has been due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that the motion is in not intended for delay."

"But we have often said that, in exercising discretion, courts must be guided by law, and that discretion may not be exercised so as to deprive a litigant of a substantial right, except for good and sufficient reasons." *Ilderton v. Charleston C. R. & L. Co.*, 113 S.C. 91, 101 S.E. 282 at 283 (S.C. 1919). "***A party ought not to be compelled to go to trial in the absence of the only witness by whose testimony he can make out his action or defense***, unless it appears that he has

been guilty of negligence in procuring the attendance of such witness, or in obtaining his testimony." Id. at 283 (emphasis added).

The trial judge, Judge Hall, was also the judge that was present for the roster meeting the day before the trial began and was well aware of what the parties had been told regarding the scheduling of the case. Specifically, the parties had been told that the case was assigned to Judge McKinnon in the December 4, 2019 email from the clerk of court and that this bench trial would be subject to being called in front of Judge McKinnon. (12/4/19 email, R. p. 184; Trial Tr. p. 5, ll. 17-20; R. 82). The parties were also told that Judge Hall was beginning a trial that would last until at least Tuesday and that Judge McKinnon had a personal conflict that would make him unavailable after 2:00 on Tuesday. (e-mail dated December 4, 2019; R. 184).

When Appellant's counsel appeared Tuesday morning for the trial, he told the judge that his client was not present and that he had not been able to get in touch with him that morning to let him that the case had been called. (Trial Tr. p. 6, ll. 16-21; R. p. 83). Judge Hall did inquire of Appellant's counsel as to what he told his client about when the trial would begin. Mr. Phillips told the court that Appellant and his out of state witness were at his office Monday morning ready for trial and after the roster meeting, he told them that he conveyed the information he received from the court and "that we're gonna have to see when this case can actually be heard; there are a lot of moving pieces." (Trial Tr. p. 6, ll. 16-21; R. p. 83). Mr. Phillips also informed the court that he did not receive the notice that the case was being called for Tuesday until Tuesday morning. (Trial Tr. p. 6, ll. 4-6; R. p. 83). Mr. Phillips also indicated that while he was unable to reach Appellant that morning, he had not had any difficulty getting in touch with his client throughout the attorney-client relationship. (Trial Tr. p. 7, ll. 10-12; R. p. 84).

When asked by the court if he was ready to proceed with the trial, Mr. Phillips indicated that he didn't have his client present with the obvious implication that he would not be able to present his defenses in the case without him. (Trial Tr. p. 6, ll. 10-12; R. p. 83). Mr. Phillips also represented to the court that he needed Appellant present to introduce testimony and evidence in the case and could not do so without him present. (Trial Tr. p. 9, ll. 15-18; R. p. 86). Mr. Phillips also showed the court that Appellant was present and ready Monday morning for trial and that he had diligently tried to contact Appellant that morning to no avail. (Trial Tr. p. 6, ll. 10-12; R. p. 83). Appellant's attorney also demonstrated that needing additional time was not meant for the purpose of delay by showing that Appellant and his out of state witness were present and ready for trial the day before. It cannot credibly be argued that Appellant had purposefully failed to appear on Tuesday in an effort to delay the trial when he was present and ready Monday morning for the trial.

With Appellant's counsel having substantially complied with SCRCP Rule 40(i), the trial judge was in a position where he had to decide whether or not to move forward with the trial without Appellant or his out of state witness present. At this point, the trial judge knew Appellant's attorney was told that the assigned judge was unavailable Tuesday for multiple reasons, that Appellant's attorney told Appellant and his out of state witness that the case would not be tried that week, that Appellant was present with his witness ready for trial Monday morning, that Appellant's attorney found out the case was being called on Tuesday only that same morning, that Appellant had been responsive to his attorney's attempts to contact him in the past, and that moving forward would leave Appellant with no witnesses to present evidence and testimony relating to his side of a contested debt collections action between brothers. Also, there was no indication that Appellant was guilty of being negligent in failing to be present or have his witness present. In

fact, the court told Appellant's attorney it was very unlikely the case would be called that week due to multiple conflicts with the assigned judge. The court actually told the parties that the case was assigned to Judge McKinnon and never indicated that the case would be called to be heard by Judge Hall.

While Appellant doesn't accuse the court of being intentionally deceptive, the way the court presented the scheduling situation telling the parties that the assigned judge could not hear the case on Tuesday, then calling the case on Tuesday, would make any reasonable attorney feel he had been misled by the court, even if unwittingly so. In addition, any reasonable attorney hearing what the court told the parties about scheduling would have felt safe in telling his client the case would not be tried that Tuesday and likely for the rest of the week.

Given the fact that Appellant was present Monday morning ready to try the case and the fact that Appellant's attorney didn't find out about being called for trial until what appears to be a matter of minutes before the start of the trial, the fair and prudent thing to have done would have been to give Appellant's counsel at least the day Tuesday to track Appellant down before forcing the trial to begin. If Appellant's attorney could not reach Appellant within enough time to fit the trial in Tuesday, continuing the trial until the next term would have only been fair and prudent since moving forward with the trial would deprive Appellant of a substantial right – the right to be able to present testimony to defend against allegations made against you. As the court in *Ilderton* held, "A party ought not to be compelled to go to trial in the absence of the only witness by whose testimony he can make out his action or defense." *Id.* This is exactly what the trial judge in this case did. While being present and ready the Monday of the trial week with his out of state witness, due to information received from the court and his attorney that the assigned judge was not available Tuesday, Appellant ended up being deprived of his right to present testimony in the case

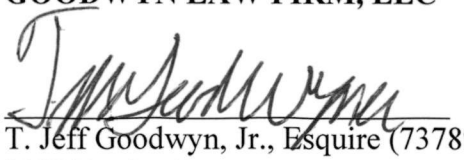
since he only had his attorney present for the trial to try to present his side of this contested debt dispute.

For the above reasons and in light of all of the above-described circumstances, the Court of Appeals erred in failing to find that the trial judge abused his discretion in moving forward with the case without the presence of Appellant and subsequent denial of Appellant's Motion for New Trial, and this court should reverse on this issue and remand the case for a new trial.

CONCLUSION

Appellant was present and ready for trial with his out of state witness the Monday of the trial week when the court told the parties that the assigned judge had a conflicting jury trial and a personal conflict on Tuesday. The other sitting judge that term, Judge Hall, also had a jury trial scheduled. No indication was given that the case would be called by Judge Hall. As a result, Appellant's attorney told Appellant the case would not be heard Tuesday and he made other plans and could not receive his attorney's emails and calls to inform him the case was called on Tuesday morning. Judge Hall called the case anyway after his jury trial settled late Monday. Not receiving the email from the clerk that the case would be called Tuesday until Tuesday morning, Appellant's attorney was not able to get in touch with Appellant on such short notice and after telling him the case would not be called Tuesday. As held by the Supreme Court in *Ilderton,* "A party ought not to be compelled to go to trial in the absence of the only witness by whose testimony he can make out his action or defense." *Id.* Knowing all of this and that Appellant would be severely prejudiced by having no witnesses to present his side of the case, the trial judge abused his discretion in deciding to move forward with the trial without Appellant present. As a result, this court should reverse and remand the case for a new trial.

GOODWYN LAW FIRM, LLC



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